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10 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

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12 JACK K. STEIN,

13 Petitioner,

14 v.

15 SCOTT FRAKES,

16 Respondent.  
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CASE NO. C09-5006RBL/JRC

REPORT AND  
RECOMMENDATION

Noted for October 2, 2009

18 The underlying Petition for a Writ of Habeas Corpus has been referred to United States  
19 Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C. § 636(b)(1)(A) and 636 (b)(1)(B),  
20 and Local Magistrate Judge's Rule MJR3 and MJR4. Petitioner is seeking federal habeas relief,  
21 pursuant to 28 U.S.C. § 2254.

22 FACTS

23 Petitioner has had three trials on the same criminal charges. The first trial resulted in a  
24 mistrial. The second trial in 1988 resulted in a conviction for three counts of attempted murder  
25 and one count of burglary. That conviction was over turned and in 2004 petitioner was retried  
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1 and again convicted of three counts of attempted murder and one count of burglary. This  
2 petitioner followed the third conviction.

3 The original petition included over 135 pages of argument (Dkt. # 10). The nine grounds  
4 for relief are set forth in notice pleading fashion and petitioner's argument appears to relate  
5 mostly to his prior convictions -- not his 2004 trial. While there are nine grounds for relief raised,  
6 it is impossible to tell what facts support each ground or if the facts relate to the 2004 trial or  
7 prior trials.  
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9 Respondent moved for a more definite statement (Dkt # 31). The motion was granted  
10 and petitioner was instructed as to the defects in his petition and what he needed to file in order  
11 to cure the defects (Dkt # 39). Petitioner was limited to a petition and an eight-page  
12 memorandum (Dkt # 39). On April 27, 2009, petitioner filed the amended petition (Dkt # 45 and  
13 46). The amended petition still contained a number of defects. On June 15, 2009, petitioner was  
14 given one final chance to file a proper petition that clearly set forth his claims and set for the  
15 factual basis for the claims (Dkt. # 67). The court did not specify a limit on the number of pages  
16 in that last order.  
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18 The response to this court order was filed in pieces and includes an amended petition  
19 (Dkt. # 77), an argument in the form of a letter stating that the petition was not a second or  
20 successive petition (Dkt # 81), a memorandum in support of the petition (Dkt # 83), an amended  
21 memorandum in support of the petition (Dkt. # 86), and corrections to the amended  
22 memorandum (Dkt. # 88). The amended memorandum is 244 pages long (Dkt. # 86). The  
23 pleadings barely mention the 2004 trial and contain mostly petitioner's opinions on events prior  
24 to his 2004 trial. The pleading is not responsive to the court's order and does not contain a clear  
25 statement of the facts for each ground for relief. The respondent cannot reasonably be expected  
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1 to formulate an answer to the documents filed. This court now recommends that the petition be  
2 DISMISSED for failure to comply with a court order.

### 3 DISCUSSION

4 The respondent accurately briefed the law regarding the sufficiency of a petition and the  
5 brining of a motion for a more definite statement:  
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7 A habeas corpus petition under 28 U.S.C. § 2254 must “specify all the  
8 grounds for relief available to the petitioner.” Rule 2(c)(1), Rules Governing Section  
9 2254 Cases. The petition must also “state the facts supporting each ground.” *Id.*, Rule  
10 2(c)(2). “[N]otice’ pleading is not sufficient, for the petition is expected to state facts  
11 that point to a ‘real possibility of constitutional error.’” *Blackledge v. Allison*, 431  
12 U.S. 63, 75 n. 7, 97 S. Ct. 1621, 1630 n. 7, 52 L. Ed. 2d 136 (1977) (quoting  
13 Advisory Committee Notes to Rule 4); see also *O’Bremski v. Maass*, 915 F.2d 418,  
14 420 (9<sup>th</sup> Cir. 1990). The Federal Rules of Civil Procedure provide that if a petition is  
15 “so vague or ambiguous that a party cannot reasonably be required to frame a  
16 responsive pleading, the party may move for a more definite statement before  
17 interposing a responsive pleading.” Fed. R. Civ. P. 12(e). The court in a habeas  
18 corpus proceeding may “consider a motion from respondent to make the petition  
19 more certain.” See Advisory Committee Notes to Rule 4, Rules Governing Section  
20 2254 Cases.

21 (Dkt. # 31). What respondent fails to brief is what occurs if the petitioner or plaintiff in a civil action  
22 does not comply with the court’s order. Fed. R. Civ. P. 12 (e) states the court should strike the  
23 pleading. This equates to dismissal of the action. American Jurisprudence 2d states the appropriate  
24 sanction is dismissal of the action. Am. Jur. 2d *Federal Procedure* § 62:397. The power to dismiss  
25 should not be exercised lightly because “it forecloses inquiry into the merits of the action.” *Id.*  
26 When a response does not satisfy the court, then the court should renew its order. Here, the first  
27 response did not satisfy the court and the court renewed its order (Dkt # 39 and 67). The final  
28 attempt by petitioner is worse than the original or second attempt.

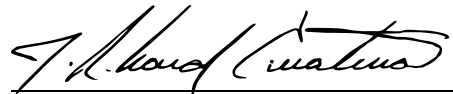
29 The court concludes that the proper course of action in this circumstance is to dismiss this  
30 habeas corpus petition. Petitioner has been given multiple chances to clarify the petition and submit  
31 a clear statement of facts supporting the grounds raised. He has not complied with the court’s order  
32 and the documents submitted by him do not reasonably allow the respondent to formulate an answer.

1 The pleadings do not satisfy the requirements set forth in Rule 2 of the Rules Governing Section  
2 2254 Cases. Therefore, the Court recommends that this action be DISMISSED.

3 **CONCLUSION**

4 Based on the foregoing discussion, the Court should deny the petition for writ of habeas  
5 corpus. Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Fed. R. Civ. P., the parties shall  
6 have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ. P.  
7 6. Failure to file objections will result in a waiver of those objections for purposes of appeal.  
8 Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the  
9 clerk is directed to set the matter for consideration on October 2, 2009, as noted in the caption.  
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11 DATED this 8<sup>th</sup> day of September, 2009.

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14 J. Richard Creatura  
15 United States Magistrate Judge  
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